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ALEXANDER L. STEVAS,

No. 81-38

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

MARY ELLEN CRAWFORD,
a minor, etc., et al.,

Petitioners,

vs.

BOARD OF EDUCATION OF THE CITY OF LOS ANGELES,

Respondent.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

RESPONDENT BUSTOP'S BRIEF

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QUESTION PRESENTED

Whether an amendment to the California Constitution which in effect prohibits a state court from ordering mandatory reassignment of students on the basis of race unless authorized and required by the United States Constitution while continuing to permit a school district from making such assignments itself violates the United States Constitution.

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STATEMENT OF THE CASE

This action was instituted in August 1963. In 1970, the trial court rendered judgment for petitioners.

In 1976, the California Supreme Court filed its opinion in this case, *Crawford v. Board of Education*, 17 Cal.3d 280, 130 Cal.Rptr. 724 (1976), affirming the trial court's determination that the Los Angeles Unified School District was racially imbalanced and affirming the trial court's order that the Board propose and implement a reasonably feasible integration plan. The court reversed the trial court on the issue of defining segregated and integrated schools and remanded with instructions.

The opinion discussed various "techniques for facilitating the desegregation of school systems," 17 Cal.3d at 305, including pairing, magnet schools and satellite zoning. *Id.* and n. 17. The court indicated that it was well aware of the problems with mandatory pupil reassignment saying:

> "Although we have not specifically addressed the volatile issue of 'busing' in our discussion above, we believe that the general principles we have outlined are equally applicable to that matter. While critics have sometimes attempted to obscure the issue, court decisions time and time again have emphasized that 'busing' is not a constitutional end in itself but is simply one potential tool which may be utilized to satisfy a school district's constitutional obligation in this field. (See, *e.g., Swann, supra,* 402 U.S. at p. 28 [28 L.Ed.2d at pp. 573-574]; *United States v. Texas Education Agency, supra,* 467 F.2d 848, 874.) (10) As with the numerous desegregation techniques adverted to above, in some circumstances busing will be an appropriate and useful element in a desegregation plan, while in other instances its 'costs,' both in financial and educational terms, will render its use inadvisable." *Id.* at 309.

By peremptory writ of mandate issued in *Bustop v. Superior Court*, 69 Cal.App.3d 66, 137 Cal.Rptr. 793

(1977), Bustop intervened in the case. Bustop is an organization devoted to voluntary integration, which has in excess of 100,000 supporters.

In the fall of 1970, under trial court supervision the Board proposed a desegregation plan including mandatory reassignment. J.A. 169. In the summer of 1978, Bustop obtained a writ of supersedeas staying the mandatory reassignment portions of the plan. The California Supreme Court vacated the writ, and Bustop's petition for stay was denied by Mr. Justice Rehnquist and on transfer by Mr. Justice Powell. ***Bustop, Inc. v. Board of Education***, 439 U.S. 1380 and 1384 (1978). The Board then began mandatory reassignment, which had the net effect of increasing racial imbalance. J.A. 547-549.

On November 6, 1979, California adopted the amendment to its constitution that is the subject of this action. The Board and Bustop applied to the trial court to modify its order based on the amendment. Petitioners' Brief at 24. The remainder of the procedural history of this action is set forth in Petitioners' Brief.

SUMMARY OF ARGUMENT

Proposition 1 prohibits the judicial assignment of students on a racial basis absent the requirement of such assignment in order to remedy a federal constitutional violation. In so doing, Proposition 1 merely restated federal law because the assignment by the state of students based on race was authorized only as a remedy to a federal constitutional violation. Absent a constitutional violation extensive pupil transportation based on race violates the rights of students and parents to be free from racial assignments and quotas given them by the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and other authority.

ARGUMENT

1. Proposition 1 Embraced Existing Federal Law Because Absent a Constitutional Violation School Assignments Based on Race Violate the Fourteenth Amendment.

The right of an individual to be free from state action that discriminates based on race is well known and has long been recognized by this Court. The right of an individual to be free from state action that impinges on the fundamental privacy right to educate one's children has also long been recognized by this Court.

In the area of school desegregation, the Court has allowed infringement of both these rights, but only where necessary to remedy a federal constitutional violation, simply because there was no other way to right the wrong, no other way to dismantle a "separate but equal" or a dual school system. But:

> "Absent a [federal] constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis."
>
> ***Swann v. Charlotte-Mecklenburg Board of Education***, 402 U.S. 1, 28 (1971).

It is undisputed that each desegregation plan proposed or implemented below used racial discrimination, quotas, preferences and classifications — and no other considerations — in allocating important educational benefits and burdens.

Without the limited exception available for the use of race in remedying a federal constitutional violation, such a system is absolutely void on two grounds, either of which is dispositive: First, the use of race as a sole criteria in decision making is absolutely void. Second, any governmental action impinging on a fundamental right or using a suspect classification must be examined using the strict scrutiny test which has not been done. Absent a federal constitutional violation, busing to racially balance public schools is at "best" an affirmative action program governed by ***Regents of the University of California v. Bakke***,

438 U.S. 265 (1978). In ***Bakke***, the Court voided the University's plan, saying:

> "If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as *facially invalid*. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Id.* at 307 (emphasis added).

Since the various desegregation plans tried in Los Angeles all used race as their sole criteria to achieve a specific racial balance and used rigid racial quotas, no other result is possible under the Fourteenth Amendment, 42 U.S.C. § 1981, 42 U.S.C. § 1983, or 42 U.S.C. § 2000(d).

The University in ***Bakke*** used essentially the same reasoning to justify its plan as the Petitioners would use in justifying mandatory reassignment based on race to racially balance schools. The Court's answer to that contention is instructive:

> "The school desegregation cases are inapposite. Each involved remedies for clearly determined [federal] constitutional violations. *E.g.*, ***Swann v. Charlotte-Mecklenburg Board of Education***, 402 U.S. 1 (1971); ***McDaniel v. Barresi***, 402 U.S. 39 (1971); ***Green v. County School***

> *Board*, 391 U.S. 430 (1968). Racial classifications thus were designed as remedies for the vindication of constitutional entitlement. Moreover, the scope of the remedies was not permitted to exceed the extent of the violations. *E.g.*, *Dayton Board of Education v. Brinkman*, 433 U.S. 406 (1977); *Milliken v. Bradley*, 418 U.S. 717 (1974); see *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976). *See also Austin Independent School District v. United States*, 429 U.S. 990, 991-995 (1976) (POWELL, J. concurring). *Here, there was no judicial determination of [federal] constitutional violation as a predicate for the formulation of a remedial classification.*"
>
> *Regents of the University of California v. Bakke, supra*, at 300 (note omitted) (emphasis added).

In declining our stay application in 1978, Mr. Justice Rehnquist rejected this line of reasoning saying the California Constitution had been construed "to require less of a showing on the part of plaintiffs who seek court-ordered busing than this Court has required of plaintiffs who seek similiar relief under the United States Constitution." *Bustop, Inc. v. Board of Education*, 439 U.S. 1380, 1381 (1978). Mr. Justice Rehnquist went on to say that state courts are free to interpret state constitutions "to impose more stringent restrictions on the operation of a local school board." *Id.* at 1382. Mr. Justice Rehnquist rejected our argument "that each citizen of a State who is either a

parent or a schoolchild has a 'federal right' to be 'free from racial quotas and to be free from extensive pupil transportation that destroys fundamental rights of liberty and privacy' " saying, "While I have the gravest doubts that the Supreme Court of California was *required* by the United States Constitution to take the action that it has taken in this case, I have very little doubt that it was *permitted* by that constitution to take such action." *Id.* at 1383.

We respectfully disagree. We will show below that this Court has indeed established just such rights. On an even more fundamental level, however, we ask the Court to consider the wisdom of a rule which would justify racial discrimination on the grounds that it serves a "higher" standard or on the grounds that its purpose, here the racial balance of public schools, is desirable.

Bakke teaches:

> "By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them."
>
> 438 U.S. at 298-99.

As Mr. Justice Douglas observed:

> "If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordianlike quality."
>
> ***DeFunis v. Odegaard***, 416 U.S. 312, 343 (1974) (dissenting opinion).

Mandating reassignment that is unrelated to a constitutional violation involves a lower standard than allowed by the federal Constitution for another reason: it places a stigma on minority students. The horror of the stigma of not allowing black students to attend school with white students was a prime moving force in ***Brown v. Board of Education***, 347 U.S. 483 (1954).

But a different, but clearly related, stigma is inherent here.

Again quoting Mr. Justice Douglas:

> "A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom, and in the end may produce that result despite its contrary intentions. One other assumption must be clearly disapproved, that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any [person]."
>
> ***DeFunis v. Odegaard, supra***, at 343 (dissenting opinion).

2. The Use of Pupil Transportation Violates the Liberty and Privacy Rights Guaranteed by the Fourteenth Amendment.

Even in dismantling the most egregious case of a dual school system, the remedy must be carefully tailored to fit the wrong — for the remedy infringes on fundamental constitutional rights:

> " 'the task is to correct by a balancing of the individual and collective interests, "the condition that offends the Constitution." A federal remedial power may be exercised "only on the basis of a constitutional violation" and, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Milliken v. Bradley*, 418 U.S. 717, 738, 41 L.Ed.2d 1069, 94 S.Ct. 3112 (1974), quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 28 L.Ed.2d 554, 91 S.Ct. 1267 (1971).' "
>
> *Austin Independent School District v. United States*, 429 U.S. 990, 50 L.Ed.2d 603 (1976).
>
> "The individual interests at issue here are as personal and important as any in our society. They relate to the family, and to the concern of parents for the welfare and education of their

> children — especially those of tender age. Families share these interests wholly without regard to race, ethnic origin, or economic status. It also is to be remembered, in granting equitable relief, that a desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offending action but, rather, upon innocent children and parents."
>
> *Id.* at n. 7, 50 L.Ed.2d at 605.

Absent a federal constitutional violation, there is nothing to balance against the rights of the family.

A child has the right to attend his neighborhood school — not a segregated school — but a neighborhood school open to all regardless of race. While this right is not spelled out in the Constitution, it is a fundamental right specified in a number of cases and proclaimed by eminent justices throughout this century.

Most recently, Mr. Justice Powell referred to these rights in ***Bakke***. In rejecting the University's claim that school desegregation cases supported its discrimination, the Court distinguished two lower court cases approving voluntary actions to eliminate racial imbalance where there was no federal violation.

> "In neither, however, was there any showing that the school board planned extensive *pupil*

> *transportation* that might threaten *liberty* or *privacy* interests."
>
> ***Regents of the University of California v. Bakke***, 438 U.S. 265, 300 n. 39 (1978) (emphasis added).

This was not an off-handed statement; it was based on, among other things, language in ***Keyes v. School District No. 1***, 413 U.S. 189, 244-48, 37 L.Ed.2d 548, 584-85 (1973) (POWELL, J. concurring in part and dissenting in part) (emphasis added) (citation omitted):

> "The refusal of the Court in *Swann* to require racial balance in schools throughout the district or *the arbitrary elimination of all 'one-race schools'* . . . is grounded in a recognition that the State, parents, and children all have at stake in school desegregation decrees, legitimate and recognizable interests.
>
> "*The personal interest might be characterized as the desire that children attend community schools near home.*"
>
> * * *
>
> "Neighborhood school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education. Public schools have been a traditional source of strength to our Nation, and that strength may derive in part from the identification of many schools with the personal features

of the surrounding neighborhood. Community support, interest, and dedication to public schools may well run higher with a neighborhood attendance pattern: distance may encourage disinterest. Many citizens sense today a decline in the intimacy of our institutions — home, church, and school — which has caused a concomitant decline in the unity and communal spirit of our people . . ..

"Closely related to the concept of a community and neighborhood education, are those rights and duties parents have with respect to the education of their children. The law has long recognized the parental duty to nurture, support, and provide for the welfare of children, including their education. In ***Pierce v. Society of Sisters***, a unanimous Court held that: 'Under the doctrine of ***Meyer v. Nebraska***, we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . .. ***The child is not the mere creature of the State***; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.'

"And in ***Griswold v. Connecticut***, the Court noted that in ***Pierce***, 'the right to educate one's

children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments.' I do not believe recognition of this right can be confined solely to a parent's choice to send a child to public or private school . . . .

"*In the commendable national concern for alleviating public school segregation, courts may have overlooked the fact that the rights and interests of children affected by a desegregation program also are entitled to consideration.* Any child, white or black, who is compelled to leave his neighborhood and spend significant time each day being transported to a distant school suffers an impairment of his liberty and his privacy. Not long ago, James B. Conant wrote that '[a]t the elementary school level the issue seems clear. *To send young children day after day to distant schools by bus seems out of the question.*' "

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), cited above in *Keyes*, the Court struck down a Connecticut statute making the use of contraceptives a criminal offense, finding an unconstitutional invasion of the right of privacy.

In talking of the sanctity of the family and the rights involved in marriage the Court concluded:

"We deal with a right of privacy older than the Bill of Rights — older than our political parties, older than our school system."

Id. at 486.

Concurring in *Griswold*, Mr. Justice Goldberg quoted Mr. Justice Brandeis, who said, albeit before his time:

> " 'The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness . . .. They conferred as against the Government, *the right to be let alone* — the most comprehensive of rights and the most valued by civilized men.' "
>
> *Id.* at 494 (emphasis added).

Mr. Justice Harlan stated, dissenting in *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961):

> "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."

In *Roe v. Wade*, 410 U.S. 113 (1973), striking down a Texas criminal anti-abortion statute, Mr. Justice Blackman, speaking for the Court, reiterated that while the Constitution does not explicitly mention any right of privacy, "zones of privacy" have been recognized under the First, Fourth, Fifth, and Ninth Amendments. Indeed, "in the penumbras of the Bill of Rights." *Id.* at 152. He further recognized that the right or zones of privacy are inherent in

"the concept of liberty guaranteed by the first section of the Fourteenth Amendment." *Id.*

In concurring in *Roe v. Wade*, Mr. Justice Douglas said many rights come within the meaning of liberty as under the Fourteenth Amendment:

> "*First is the autonomous control over the development and expression of one's intellect, interests, tastes, and personality.*"
>
> * * *
>
> "*Second is freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children . . ..*
>
> "These rights are 'fundamental,' and we have held that in order to support legislative action the statute must be narrowly and precisely drawn and that a 'compelling state interest' must be shown in support of the limitation."
>
> * * *
>
> "*Third is the freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf.*"
>
> 410 U.S. at 211-13 (emphasis in original).

Mr. Justice Frankfurter, concurring in *May v. Anderson*, 345 U.S. 528, 536 (1953), noted that "children have a very special place in life which the law should reflect."

In *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551 (1972), a statute that deprived an unwed father of custody was voided. Mr. Justice White carefully described the protected interest of the family:

> "The private interest here, that of a man and the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect' . . ..
>
> "The Court has frequently emphasized the importance of the family . . .. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' "
>
> *Id.* at 651.

These rights are clearly infringed by the government's taking children away from their neighborhood school and putting them in buses for hours each day as a prerequisite to receiving a public education. Proposition 1 merely codified these principles. In a sense, it was unnecessay because it was redundant.

3. Federal Statutes Prohibit Busing and School Assignments Based on Race. Any California Law That Authorized Such Activities, Would Conflict with Federal Statutes and Must Fall Under the Supremacy Clause.

> "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. U.S. Const., Art. VI. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. *Our task is 'to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'* "
>
> ***Jones v. Rath Packing Co.***, 430 U.S. 519, 525-26 (1977) (emphasis added).

In ***Jones v. Rath***, the Supreme Court invalidated a California law merely because it conflicted with one of the purposes of the federal statute in question, in spite of a specific finding that it was possible to comply with both federal and California law. *Id.* at 540.

Insofar as California law is interpreted as requiring or permitting busing without a federal constitutional violation, such action runs afoul of the Supremacy Clause, as it would "stand as an obstacle to the full purposes and objectives of Congress" in enacting a number of statutes, particularly the Equal Educational Opportunities Act of 1974, 20 U.S.C.A. §§ 1701 et seq. (1978).

Congressional legislation has clearly demonstrated an intent and purpose to eliminate all discrimination based on race in public education; to support the existence of the neighborhood school; and to eliminate forced busing.

Section 202 of Title II of the Equal Educational Opportunities Act of 1974, 20 U.S.C.A. § 1701 (1978), states:

> "Congressional declaration of policy
>
> "(a) *The Congress declares it to be the policy of the United States that —*
>
> (1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and
>
> (2) *the neighborhood is the appropriate basis for determining public school assignments.*"
>
> (Emphasis added.)

Just as Justice Powell, in footnote 39 in ***Bakke***, drew a distinction where "the school board planned extensive

pupil transportation," the legislative history of the Equal Educational Opportunities Act showed tremendous hostility, not to integration, but to pupil transportation.

In introducing his Amendment, Congressman Esch, the bill's author, said:

> "[W]hat we have before us today is an amendment that has been very carefully drawn to resolve the issue of constitutionality involved in the proposition that every child should be educated to his fullest extent possible that child should also be educated in a neighborhood school . . .. [I]t would clarify the intent of this Congress to reemphasize education in neighborhood schools . . .."
>
> * * *
>
> "I think that the people . . . in the inner cities and suburbs throughout the country are tired of this threat of cross-country busing and they, like many Americans, both black and white, are tired of having their children used in a poorly thought out social experimentation. I do not blame them and I urge the Congress to adopt this amendment."
>
> Congressional Record — House, March 26, 1974, H 2161.

Further elaboration on the purposes of the Esch Amendment is shown by the statements of one of the bill's sponsors, Congressmen O'Hara:

> "Racially selective schoolbusing was wrong when it was used to perpetuate dual school systems. Racially selective schoolbusing is wrong when it is used in the name of 'desegregation' with the goal of meeting racial quotas in given schools or school districts." *Id.*

The principle purpose behind the Esch Amendment was concisely stated by Congressman Milford who said:

> "The issue is the forced busing of students. Time and time again surveys and polls show that the people of this Nation do not want their children going to school outside their own neighborhood.
>
> "This amendment puts a stop to the practice.
>
> * * *
>
> "The transportation solution to racial imbalance in the schools perhaps has solved a statistical problem. But it has ill-served its ultimate goal — the achievement of good will among Americans of different race.
>
> "Mr. Chairman, I sincerely hope that this amendment is not tagged as 'anti-integration,' because I favor racial integration as much as any

> member of this body. We have open housing laws, and, I believe we should push harder to make job training and jobs available so that families can afford to change neighborhoods if they wish, instead of moving children around like pawns in some kind of statistical game."
>
> *Id.* at 2164.

One cannot read Congressman Milford's remarks without thinking they seem specifically aimed at the proceedings in the instant case.

An examination of the legislative history of the Equal Educational Opportunities Act of 1974 demonstrates that the major purposes for this congressional enactment, indeed its *raison d'etre*, was to preserve the neighborhood school and prevent forced busing and school assignments based on race where they were not required under the federal Constitution. Proposition 1 embraces this statute as interpreted.

The California Equal Protection Clause, as interpreted by the California Supreme Court in *Crawford*, and as "interpreted and applied" prior to Proposition 1, stood as an obstacle to the accomplishment and execution of the purposes and objectives of Congress.

CONCLUSION

Proposition 1's sole purpose and effect was to bring California law in line with federal law which neither authorized nor permitted pupil transportation based on race unless necessary to remedy a federal constitutional violation.

Respectfully submitted,

CLIFF FRIDKIS

Attorney for Respondent Bustop